Brooklyn Law Review

Volume 73 | Issue 4 Article 6

2008

Shuffling to Justice: Why Children Should Not Be Shackled in Court

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Shuffling to Justice

WHY CHILDREN SHOULD NOT BE SHACKLED IN COURT

I. INTRODUCTION

Her hands were secured tightly with metal handcuffs, and foot cuffs were clasped around her ankles.[1] A leather belt was wrapped around her waist. This belt held metal rings that were linked to the handcuffs by a chain.[2] This "restraint belt" prevented her from raising her hands above waist level.[3] As her ankles were held closely together by the footcuffs, she had to shuffle in order to walk.[4] Led by Office of Children's and Family Services ("OCFS") staff, she was made to shuffle through a waiting room filled with people, with the clanking of her metal chains heard by all.[5] She is Jenny P., a fifteen-year-old girl who was adjudicated a delinquent in Kings County Family Court in Brooklyn.[6] She was required to live and receive rehabilitative services at the Auburn Residential Center, a non-secure facility operated by OCFS.[7] At Auburn, Jenny P. participated in field trips, she was on the Honor Roll, and she completed anger management and drug prevention programs.[8] She had never exhibited violent behavior during her trips to

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[1] This anecdote is taken from First Amended Complaint at 15, Jenny P. v. Johnson, No. 37784/2005 (N.Y. Sup. Ct. Feb. 15, 2006) [hereinafter Complaint, *Jenny P.*], *available at* http://www.njdc.info/2006resourceguide/start.swf (follow "Advocacy in Juvenile Court" hyperlink; then follow "First Amended Complaint in Jenny P. v. Johnson" hyperlink under "B. Shackling"); Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunctive Relief and Temporary Restraining Order at 13-16, No. 37784/2005 [hereinafter TRO Motion, *Jenny P.*], *available at* http://www.njdc.info/2006resourceguide/start.swf (follow "Advocacy in Juvenile Court" hyperlink; then follow "Brief in Support of Plaintiffs' Motion" hyperlink under "B. Shackling").

[2] Complaint, *Jenny P.*, *supra* note 1, at 5-6.

[3] *Id.* at 6.

[4] *See id.* at 15.

[5] *Id.*

[6] *Id.* at 7; TRO Motion, *Jenny P.*, *supra* note 1, at 11.

[7] TRO Motion, *Jenny P.*, *supra* note 1, at 11.

[8] *Id.* at 11-12.

court.[9] Furthermore, the court did not determine that the restraints were necessary to prevent her from attempting to hurt someone or escaping the courtroom.[10] In fact, no one had ever inquired as to Jenny P.'s mood or feelings each time she was brought to court and made to wait in a secure holding room while in shackles, or when she was brought in front of the judge wearing full restraints.[11]

Jenny P.'s experience is not uncommon. In fact, until 2005 when the Legal Aid Society brought a class action lawsuit challenging the blanket OCFS policy of shackling children, each child who was in OCFS custody was shackled for the duration of the time they were in court.[12] One child was made to wait for nearly eight hours while fully shackled in a waiting room.[13] Moreover, they were required to appear in front of the judge in footcuffs and a restraint belt, without any individualized determination of need.[14] The practice of shackling children who are in the juvenile justice system is not isolated to New York. Indeed, at least twenty-eight states have courts that require juveniles to appear in shackles during juvenile court proceedings.[15] Active litigation is challenging this practice in New York and Florida.[16] However, in some courtrooms around the country, defenders' motions for children to appear at proceedings free from restraints are routinely denied in the name of courtroom security.[17] Judges in Florida recently denied such motions, explaining that they were not convinced by evidence showing that shackling may cause psychological damage and noting the importance of maintaining courtroom security.[18] Thus, although some counties have been successful

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[9] *Id.* at 17.

[10] *Id.* at 1.

[11] *Id.* at 12-16.

[12] *Id.* at 1.

[13] *Id.* at 9.

[14] *Id.* at 1, 5.

[15] Martha T. Moore, *Should Kids Go to Court in Chains?*, USA TODAY.COM, June 18, 2007, *available at* http://www.usatoday.com/news/nation/2007-06-17-shackles_N.htm.

[16] John F. v. Carrion, No. 07/407117 (NY. Sup. Ct. Dec. 12 2007) (on file with author) (The Jenny P. action was withdrawn and re-filed with the new named plaintiff John F.); *infra* notes 129-132 and accompanying text.

[17] *See infra* Part IV.A-B (discussing the extent of shackling practice and response of courts in select counties).

[18] Kathleen Chapman, *Judges Refuse to Unshackle Juveniles*, PALM BEACH POST, Feb. 2, 2007, *available at* http://www.pdmiami.com/Palm_Beach_Post-Judges_refuse_to_unshackle_juveniles.pdf. In denying motions submitted by the Palm Beach County Office of the Public Defender to allow juveniles to appear in court free from

in challenging the routine use of shackles on juveniles, many children continue to be shackled each time they appear in juvenile court. The juvenile justice system has its historical roots in providing treatment instead of punishment.[19] Shackling thwarts the very purpose of this system by treating children like criminals.

The Supreme Court has explicitly stated that blanket policies that require all criminal defendants to appear in court while shackled are impermissible.[20] However, the Court is silent on the applicability of this rule to juvenile court proceedings. Because there is no clear jurisprudence on when shackles may be used during juvenile court proceedings, state policies vary widely.[21] While a handful of courts have held that juveniles may not be shackled without some showing of need, many others have failed to apply any standard.[22] Therefore, thousands of children are required to endure the humiliation and physical pain of shackling even though they show no threat of danger or risk of flight.

In this Note, I argue that routine and indiscriminate use of shackles on juveniles is contrary to the objectives of the juvenile justice system. The juvenile justice system was premised on the notion that juveniles need treatment and rehabilitation, and they should not be treated punitively like adults.[23] Further, I argue that when children are required to appear in court in shackles for no justification, their sense of

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restraints, the panel of four judges concluded that "the public defender did not present satisfying evidence that the restraints can cause psychological damage and failed to consider court security."

[19] *See infra* Part III (discussing the purpose of the juvenile justice system).

[20] Deck v. Missouri, 544 U.S. 622, 628-29 (2005).

[21] See *infra* Part IV.A.

[22] There have been numerous successful challenges to the routine and indiscriminate use of shackles on juveniles in state courts. *See* Tiffany A. v. Superior Court of L.A. County, 59 Cal. Rptr. 3d 363, 373 (Ct. App. 2007) (stating that courts may not apply a blanket shackling policy without individualized determination of need); *In re* Staley, 352 N.E.2d 3, 6 (Ill. App. Ct. 1976) (finding error where a child was shackled without sufficient reason, such as to prevent escape or to ensure courtroom safety), *aff'd*, 364 N.E.2d 72 (Ill. 1977); State v. Merrell, 12 P.3d 556, 558 (Or. Ct. App. 2000) (stating in a case involving a juvenile that a defendant may only be shackled when the court has determined that he poses a "serious risk of committing dangerous or disruptive behavior, or . . . a serious risk of escape"); State *ex rel.* Juvenile Dep't of Multnomah County v. Millican, 906 P.2d 857, 860-61 (Or. Ct. App. 1995) (finding that shackling a juvenile during a bench trial constituted constitutional error but that such error was harmless because there was no showing that the restraint was prejudicial). *But see infra* Part IV.A for examples of courts that have not applied the general rule from *Deck* to the shackling of juveniles.

[23] *See infra* Part III.A.

fairness and justice is disrupted. The judicial system has an opportunity to educate children about justice and equality, but the routine use of shackles reinforces the notion that our justice system is unfair and inequitable. Further, it teaches children that they are not valued and respected.

In Part II, I describe the legal standard for shackling in criminal court, including the Supreme Court decision *Deck v. Missouri* and the evolution of federal law applicable to shackling adult criminal defendants in court. Then, in Part III, I discuss the objectives of the juvenile court system, focusing on the system's origins in treatment and rehabilitation rather than punishment. Part III concludes that a bargain was struck between the juvenile courts and children in the system to provide fewer procedural protections in exchange for a more rehabilitative and less punitive system. This bargain, I will argue, is repudiated through the practice of shackling children in court.

In Part IV, I examine the extent to which courts require children to appear in shackles, the harms shackling causes to children, and the misguided justifications that are offered for requiring children to appear shackled in court. Finally, in Part V, I begin with an overview of the scant case law regarding shackling children in juvenile court. Then, I argue that the recent California Court of Appeal case *Tiffany A. v. Superior Court* sets forth a model analysis against routine shackling that recasts the demand to end indiscriminate shackling in terms of the distinct characteristics and needs of juveniles in the juvenile system. Instead of relying solely on the framework provided in *Deck*, juvenile courts should emphasize that shackling is distinctly harmful when applied to children because of the rehabilitative focus of the juvenile courts. I conclude by offering another reason to end the practice of routinely shackling children in court: when shackling juvenile defendants is limited to those rare situations when there is an individualized need, young people learn the values of a fair and just criminal justice system.

II. SHACKLING AND THE LEGAL STANDARD IN CRIMINAL COURT

The first court to speak on the issue of using shackles on a criminal defendant was the California Supreme Court in

1871.[24] In *People v. Harrington*, the defendants had been convicted of robbery, and throughout their trial they had appeared in "irons."[25] The California Supreme Court denied the defendants' request that they be tried without the shackles.[26] On appeal, the defendants argued that their common law rights were violated when they were tried while shackled.[27] The California Supreme Court held that requiring the defendants to be tried in shackles without justification violated their rights.[28] Furthermore, the court expressed some of the key concerns that the United States Supreme Court later relied upon when it ruled against the indiscriminate use of visible shackles on a defendant at trial and sentencing.[29] These concerns were that shackles have a prejudicial effect and disrupt a defendant's ability to adequately participate in his defense.[30] While the *Harrington* court set down a clear rule on the use of shackles, most other courts remained silent on the issue until the twentieth century.[31]

Today, the right of the accused to appear at trial free from the visible restraint of shackles has been upheld by numerous courts as a matter of state or federal law.[32] The

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[24] People v. Harrington, 42 Cal. 165 (1871).

[25] *Id.* at 166.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 168-69 (ruling on common law grounds, but noting that state constitutional rights might be implicated).

[29] *Compare id.* at 168 *with* Deck v. Missouri, 544 U.S. 622, 630-31 (2005); Holbrook v. Flynn, 475 U.S. 560, 568 (1986); Illinois v. Allen, 397 U.S. 337, 344 (1970).

[30] The *Harrington* Court stated:

> [A]ny order or action of the Court which, without evident necessity, imposes physical burdens, pains and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense; and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own behalf.

42 Cal. at 168.

[31] *Deck*, 544 U.S. at 641-42 (Thomas, J., dissenting) ("In 35 States, no recorded state-court decision on the issue appears until the 20th century. Of those 35 States, 21 States have no recorded decision on the question until the 1950's or later. The 14 state (including then-territorial) courts that addressed the matter before the 20th century only began to do so in the 1870's.").

[32] *See generally* Sheldon R. Shapiro, Annotation, *Propriety and Prejudicial Effect of Gagging, Shackling, or Otherwise Physically Restraining Accused During Course of State Criminal Trial*, 90 A.L.R. 3D 17 (1979) (discussing several state cases recognizing as a general rule an accused's right to appear at trial free of shackles). For a list of lower court decisions upholding the right of defendants to appear free from

primary concern expressed regarding shackling at the guilt phase of a criminal trial is potential for prejudicing the jury.[33] Courts also note the impact shackling has on the accused's ability to participate in his own defense and to communicate with his attorney, as well as the effect shackles have on the dignity and decorum of the courtroom.[34] The Supreme Court's jurisprudence on shackling has evolved through three main cases: *Illinois v. Allen*, *Holbrook v. Flynn*, and *Deck v. Missouri*.[35]

A. Illinois v. Allen *(1970)*

In *Illinois v. Allen*, the Supreme Court held that the use of shackles, binds, or gags on a defendant who is unwilling to behave appropriately at trial may be necessary, but that these techniques may only be used as a last resort.[36] In *Allen*, the defendant was convicted of armed robbery when he stole $200 at gunpoint from a bartender.[37] At trial, Allen demanded that he act as his own attorney, and the trial judge allowed him to represent himself until he began to act in a hostile and defiant manner.[38] During voir dire Allen repeatedly ignored the judge's warnings that he must behave while in court. After Allen refused to cooperate, made statements threatening the judge's life, and insisted that "there would be no trial," the trial judge removed Allen for part of the proceedings.[39] Allen was allowed to return to the proceedings after he agreed to behave properly,

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visible restraint, but allowing the right to be overcome by essential state interests such as courtroom security or escape prevention, see *Deck*, 544 U.S. at 628-29.

[33] *Deck*, 544 U.S. at 630 (detailing the prejudicial effect of visible shackles). "Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process." *Id.*

[34] *See* Shapiro, *supra* note 32, at 17.

[35] *See generally Deck*, 544 U.S. 622 (holding that the prohibition on visible restraints without a showing of an essential state interest applies with equal force to the penalty phase of a capital trial as it does to the guilt phase); Holbrook v. Flynn, 475 U.S. 560 (1986) (holding that the presence of security guards was not so prejudicial as to deny the defendant's right to a fair trial); Illinois v. Allen, 397 U.S. 337 (1970) (finding that shackles should only be used as a last resort).

[36] *Allen*, 397 U.S. at 343-44.

[37] *Id.* at 338-39.

[38] *Id.* at 339-41.

[39] *Id.* at 340. During one of Allen's outbursts, he stated, "When I go out for lunchtime, you're [the judge] going to be a corpse here." *Id.* (quoting United States *ex rel.* Allen v. Illinois, 413 F.2d 232, 233 (7th Cir.1969), *rev'd on other grounds*, Illinois v. Allen, 397 U.S. 337 (1970)).

but he made another outburst and was again removed from the courtroom.[40]

In reviewing the case, the Supreme Court attempted to strike a balance between upholding a defendant's constitutional rights and maintaining safety and the appropriate administration of criminal proceedings. The Court set forth three constitutionally permissible ways for a trial judge to handle a defiant defendant: "(1) bind and gag him, thereby keeping him present; (2) cite him for contempt; [and] (3) take him out of the courtroom until he promises to conduct himself properly."[41] While the Court acknowledged that circumstances may exist that permit the use of shackles or physical restraints on a defendant, it took pains to emphasize that the use of shackles should be severely limited, declaring that shackles and gags should only be used as a "last resort."[42] The Court further noted that the "sight of shackles and gags"[43] might impact the jury's feelings about the defendant, may impair the defendant's ability to communicate with his attorney, and is generally an "affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold."[44] Thus, *Allen* stands for the proposition that requiring a defendant to appear in court in visible physical restraints is an offense to a fair and impartial criminal justice system, and must only be used as an absolute last resort.

B. Holbrook v. Flynn *(1986)*

Sixteen years later, the United States Supreme Court considered the presence of uniformed guards at a defendant's trial in comparison to visible shackles. In *Holbrook v. Flynn*,

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[40] *Id.* at 340-41. Shortly after the trial judge warned Allen that if he continued to make outbursts he would be removed from the courtroom, Allen announced, "There is going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial. There's not going to be no trial like this. I want my sister and friends here in court to testify for me." *Allen*, 413 F.2d, at 234.

[41] *Id.* at 343-44.

[42] *Id.* at 344. The Court stated, "But even to contemplate such a technique [to bind and gag], much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort." *Id.*

[43] *Id.*

[44] *Id.*; *see also* Estelle v. Williams, 425 U.S. 501, 505-06 (1976) (finding that requiring a criminal defendant to wear prison clothing during his trial violated his Fourteenth Amendment right to equal protection under the law). The Court noted that "no essential state policy" is furthered by this requirement. *Estelle*, 425 U.S. at 505. The Court nonetheless upheld the conviction because the defendant failed to make an objection to the trial court. *Id.* at 512-13.

the Supreme Court held that the defendant's constitutional right to a fair trial was not violated when, during the trial, four uniformed state troopers in addition to the regular courtroom security officers sat in the front row of the courtroom.[45] The Court distinguished this case from *Estelle v. Williams*[46] and *Allen*, concluding that physical restraints and prison clothing are significantly different from the sight of uniformed police officers at a trial.[47] The Court maintained that "shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large."[48] In contrast, the Court stated that "the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable."[49] Furthermore, the Court compared the sight of uniformed security within a courtroom to visible shackles and concluded that uniformed security was not so "inherently prejudicial" to the defendant that it must comply with the legal standard for shackling and therefore be "justified by an essential state interest specific to each trial."[50] Thus, the Court suggested a hierarchy where shackling stood above other potential marks of criminality as particularly suggestive and insidious.

C. Deck v. Missouri *(2005)*

Most recently, the Supreme Court rejected the use of visible shackles on an adult defendant during the sentencing phase of a criminal trial. In 1998, Carmen Deck was convicted of the robbery and murder of an elderly couple in their home.[51] Throughout Deck's sentencing proceedings, he was shackled with leg irons, handcuffs, and a belly chain.[52] Deck's attorney objected to the use of shackles several times during the

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[45] Holbrook v. Flynn, 475 U.S. 560, 571-72 (1986).

[46] 425 U.S. 501 (1976).

[47] *Holbrook*, 475 U.S. at 569.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 568-69. The Court concluded that even if prejudice could be found in allowing the uniformed security force to remain at the trial, the prejudice could be outweighed by the "State's legitimate interest in maintaining custody during the proceedings . . . ." *Id.* at 571-72. *Cf. Estelle*, 425 U.S. at 505-06 (concluding that requiring a defendant to wear prison clothing during trial does not promote any legitimate state interest).

[51] Deck v. Missouri, 544 U.S. 622, 624-25 (2005).

[52] *Id.* at 625.

proceedings, but his motions were repeatedly overruled.[53] Deck remained shackled throughout the sentencing proceedings and was condemned to death.[54] Deck appealed his sentence on the grounds that his shackling violated Missouri law as well as the U.S. Constitution.[55] The Missouri Supreme Court affirmed Deck's sentence, concluding that first, the record did not reflect that the jury saw or was aware of the shackles; second, Deck did not argue that the shackles prevented him from communicating with his attorney; and lastly, because Deck was a repeat offender, there was evidence that he was a flight risk.[56]

On appeal, the United States Supreme Court stated that the law had prohibited visible shackles during the guilt phase of a criminal trial for many years.[57] In *Deck*, the Court extended this rule and held that this prohibition against shackles at a criminal trial included the sentencing phases of a defendant in a capital case.[58] Accordingly, a state may only shackle a criminal defendant when there is an "essential state interest."[59] The majority opinion in *Deck* relied on prior case law to set forth three guiding principles regarding the use of shackles on criminal defendants.[60] First, visible shackles are "inherently prejudicial;"[61] second, shackles may disrupt a

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[53] *Id.* The majority noted that the defendant's attorney objected prior to, during, and after jury voir dire, arguing that the jury was prejudiced by seeing the defendant in shackles. *Id.* The sentencing court disagreed, noting that by keeping the defendant in shackles the jury was relieved of any fear. *Id.*

[54] *Id.* (citing State v. Deck, 136 S.W.3d 481, 485 (Mo. 2004) (en banc), *rev'd on other grounds*, Deck v. Missouri, 544 U.S. 622 (2005)). Deck remained in shackles throughout his trial, though the shackles were not visible to the jury. *Id.* at 624. He was convicted and sentenced to death. However, at the conclusion of the trial, the Missouri Supreme Court, upholding the conviction, set aside the sentence, thus leading to the new sentencing proceeding. Deck v. State, 68 S.W.3d 418, 432 (Mo. 2002) (en banc), *aff'd*, 136 S.W.3d 481 (Mo. 2004), *rev'd*, Deck v. Missouri, 544 U.S. 622 (2005).

[55] *Deck*, 544 U.S. at 625.

[56] *State v. Deck*, 136 S.W.3d at 485-86.

[57] *Deck*, 544 U.S. at 626.

[58] *Id.* at 633. *But see* Brandon Dickerson, Casenote, *Bidding Farewell to the Ball and Chain: The United States Supreme Court Unconvincingly Prohibits Shackling in the Penalty Phase in* Deck v. Missouri, 39 CREIGHTON L. REV. 741, 743 (2006) (arguing that the rule against visible shackling should not apply with equal force to the sentencing phase and that the holding in *Deck* was based on "unconvincing reasoning and unpersuasive dicta").

[59] *Deck*, 544 U.S. at 628 (citing "physical security, escape prevention, or courtroom decorum" as examples of such essential interests).

[60] The Court in *Deck* outlined the holdings in *Holbrook*, *Allen*, and *Estelle* prior to setting forth the general rule that the Fifth and Fourteenth Amendments prohibit the use of visible shackles "absent a trial court determination . . . that they are justified by a state interest specific to a particular trial." *Id.* at 627-29.

[61] *Id.* at 628 (citing Holbrook v. Flynn, 475 U.S. 560, 568 (1986)).

defendant's ability to communicate with his counsel; and lastly, shackles undermine the appearance of dignity in the courtroom and jeopardize the tenet of innocent until proven guilty.[62]

The Supreme Court reflected on both legal history and the practice of the majority of lower courts to support its reasoning for prohibiting the use of visible shackles during the sentencing phase of a defendant's trial absent an essential state interest. As the majority in *Deck* opined, the general prohibition against visible shackles at trial is rooted in the English common law rules.[63] During the eighteenth century, William Blackstone wrote that "the defendant must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape."[64] The Court acknowledged that most trial courts have treaded close to this standard. Moreover, the Court maintained that while lower courts have differed on the procedures used to govern the standard for shackling, they have adhered to the rule that, barring a particular reason, the routine use of visible shackles on defendants is unauthorized.[65] Additionally, the *Deck* court reasoned that this standard was embedded in the U.S. Constitution's Fifth and Fourteenth Amendment guarantees of due process.[66]

In sum, the Supreme Court has been entirely clear that blanket policies requiring shackles on all defendants are impermissible. Furthermore, the Court has expressed unquestionable concern that visible shackles are prejudicial and should only be used as a last resort. Moreover, the Court recognized the significant impact shackles may have on the

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[62] *Id.* at 631; *see also Holbrook*, 475 U.S. at 569; Illinois v. Allen, 397 U.S. 337, 344; People v. Harrington, 42 Cal. 165, 168 (1871).

[63] *Deck*, 544 U.S. at 626.

[64] *Id.* (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (1769)). However, the Court acknowledged that the primary reason the common law rule against shackles existed was to prevent physical harm to the defendant, and in modern times physical harm is no longer a major concern. *Id.* at 630. Justice Thomas' dissent emphasizes this distinction between the justifications for the common law rule and the modern principle on shackling to argue that the modern rule has no resemblance to the original concerns about shackling. *Id.* at 635-40 (Thomas, J., dissenting). Furthermore, Thomas argues that the modern restraints are not physically harmful and do not interfere with a defendant's ability to defend himself at trial, the paramount concerns during the common law days. *Id.* at 640. Therefore, Thomas argues that the Court errs in equating modern day restraints with those used at the time of common law and sets forth a standard that has no historical basis. *Id.* at 640-41. This Note argues that physical harm is still a concern with shackling children. *See infra* Part IV.C.

[65] *Deck*, 544 U.S. at 628.

[66] *Id.* at 627.

dignity of the courtroom and the ability of the defendant to communicate with counsel. Finally, in *Deck*, the Court took notice that the lower courts have treated the case law from *Holbrook* and *Allen* as declaring a constitutional standard prohibiting the use of visible shackles unless there is an apparent risk of danger or flight.[67] For a variety of reasons, which will be discussed in this Note, these standards are not currently fully applied in juvenile cases.

III. OBJECTIVES OF THE JUVENILE JUSTICE SYSTEM

The juvenile justice system is premised upon the notion of treatment and rehabilitation instead of punishment, with an emphasis on individualized evaluations.[68] While a shift over the past two decades toward a focus on accountability has permeated the juvenile court system, the underlying purpose of rehabilitation has never completely disappeared.

A. History of the Juvenile Court

A review of the history of the juvenile court is necessary for understanding the principles that guided the juvenile justice system. Further, the historical background reinforces how shackling children in court undermines the goals of the juvenile justice system. The first juvenile court was established in Cook County, Illinois in 1899 in response to growing concerns that children who violated the law were being treated far too punitively.[69] Social reformers believed children should not be put through the criminal justice system in the same fashion as adults.[70] Moreover, the reformers did not believe

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[67] *Id.* at 629 (finding lower courts "have disagreed about the specific procedural steps a trial court must take prior to shackling, about the amount and type of evidence needed to justify restraints, and about what forms of prejudice might warrant a new trial, but they have not questioned the basic principle. They have emphasized the importance of preserving trial court discretion . . . but they have applied the limits on that discretion described in *Holbrook*, *Allen*, and the early English cases").

[68] *See generally* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 12 (2005) (explaining the history of the juvenile justice system and the focus on rehabilitation and individualized justice); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

[69] IRA SCHWARTZ, (IN)JUSTICE FOR JUVENILES: RETHINKING THE BEST INTERESTS OF THE CHILD 150-51 (1989).

[70] *Id.* at 150. The whole notion of setting up a separate court for juveniles is akin to accepting the proposition that children are developmentally different from adults and therefore have different needs. The differences between children and adults continue to be the subject of research. *See* AMNESTY INTERNATIONAL & HUMAN RIGHTS

children should have to face punishment and jail as a response to their transgressions from the law.[71] Instead, they decided to create a special court for children based on a "rehabilitative ideal."[72] As a result, the Illinois court focused on treatment and rehabilitation of youths, promoting the best interests of the child.[73] Therefore, the judge explored children's social and emotional needs and attempted to provide services that would help "save" the child.[74] In exchange, due process considerations and traditional adversarial proceedings were bypassed.[75]

In the two decades following the Illinois court, almost all states created special courts for children.[76] The *parens patriae*[77] concept provided the legal foundation for the juvenile court system. Accordingly, the judge sat as a father figure and provided guidance to the wayward youth. Thus, these courts

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WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 45-51 (2005) (discussing in detail the cognitive and psychosocial differences between adults and children, including research on differences in brain development suggesting that adolescents have a less-developed sense of impulse control). Recently, the U.S. Supreme Court ruled that the imposition of capital punishment on individuals under age eighteen was prohibited by the Eighth and Fourteenth Amendments. Roper v. Simmons, 543 U.S. 551, 578 (2005). In so doing, the Court recognized that children are developmentally and emotionally different from adults, less responsible for their actions, and more capable of change. *See id.* at 569-70.

[71] The Progressives were a group of reformers who tackled concerns such as women's suffrage and child labor, along with the issue of juvenile offenders. *See* SCHWARTZ, *supra* note 69, at 150. Their reforms came as a result of social problems they saw as reflecting the changes from the Industrial Revolution. *See id.* The thought behind the transformation in the juvenile court system was that juvenile offenders should be treated like abused and neglected children and the state should serve to protect these children. Mack, *supra* note 68, at 107.

[72] SCHWARTZ, *supra* note 69, at 150.

[73] *Id.* at 150-51. For a more detailed discussion of the history of the early juvenile courts, *see generally* David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE 42, 42-73 (Margaret K. Rosenheim et al. eds., 2002).

[74] Mack, *supra* note 68, at 108-10 (noting that numerous states followed the Illinois example to establish new juvenile court laws); *see also* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 3-4 (1969). In contrast to this new juvenile system, the adult criminal system was adversarial in nature. The adult system focused on punishment and jail as a response to crime. Notions of treatment and rehabilitation were not recognized in the adult system. *See* SCHWARTZ, *supra* note 69, at 150.

[75] *See* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 9, 11 (Thomas Grisso & Robert G. Schwartz eds., 2000); Mack, *supra* note 68, at 109-10.

[76] SCHWARTZ, *supra* note 69, at 151 (citing W. WADLINGTON ET AL., CASES AND MATERIALS ON CHILDREN IN THE LEGAL SYSTEM 198 (1983)).

[77] *In re* Gault, 387 U.S. 1, 16 (1966). In *Gault*, Justice Fortas noted that *parens patriae* is a Latin phrase "taken from chancery practice, where . . . it was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence." *Id.*

espoused the principle that children, regardless of their status as dependent, neglected, or delinquent most importantly needed "state supervision in the manner of a wise and devoted parent."[78] Additionally, the reformers and these special courts for children pioneered the notion of "individualized justice," where courts focused on each child's characteristics, background, and needs, and determined an appropriate treatment plan to heal the child and enable him to participate in society.[79] The system was intended to be informal.[80] By crafting a system that viewed children's transgressions as something to be treated as opposed to something worthy of punishment, there was a justification in denying children the due process rights and procedural safeguards that were the hallmark of the adult criminal court system.[81]

Beginning in 1966, after nearly sixty years, the U.S. Supreme Court had the opportunity to review this system, and over the next five years, it handed down several decisions that forever changed the landscape of juvenile justice in America. Questioning the "naïve arrogance of the rehabilitative ideal,"[82] the Court declared that "juveniles are entitled to a broad range of procedural protections previously denied them."[83] Thus, the initial phase of the juvenile court and its protectionist, "child-saving" mentality came to a close. However, in the decades following the Supreme Court's decision to provide juveniles with certain procedural safeguards, the values propounded by the social reformers continued to inform the emerging juvenile justice system.[84]

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[78] ELLEN RYERSON, THE BEST LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 42 (1978).

[79] OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES 12 (2005).

[80] *See* SCHWARTZ, *supra* note 69, at 151; *see also*, Barry C. Feld, *Criminalizing the Juvenile Court: A Research Agenda for the 1990's*, *in* JUVENILE JUSTICE AND PUBLIC POLICY 59, 60-61 (Ira M. Schwartz ed., 1992).

[81] SCHWARTZ, *supra* note 69, at 151. Schwartz comments:

> The creators of the juvenile court envisioned that this special court for children would be less like a court and more like a social welfare agency. Children who were brought to the attention of the juvenile court were to be helped rather than punished . . . . In exchange for this informality, they were denied the rights and procedural safeguards accorded to adults.

Id.

[82] FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 33 (2005).

[83] SCHWARTZ, *supra* note 69, at 151.

[84] *See infra* Part III.B. The Supreme Court in *Gault* emphasized that there need not be a conflict between providing due process rights and the vision of a

B. The Emergence of Due Process Rights

By granting certain due process rights to juveniles, the Supreme Court sought to ensure that this population was treated fairly in the juvenile court system.[85] Despite the benevolent goals of the social reformers, the informal juvenile court system was not working.[86] The Supreme Court first confronted the problems of the juvenile court system in *Kent v. United States*.[87] *Kent* was the first of four landmark juvenile justice cases that permanently altered the way juveniles were treated in the legal system.[88] In *Kent*, the Court addressed the issue of waiver of jurisdiction[89] from juvenile to adult court.[90] The Court held that waiver of jurisdiction was a "critically important action determining vitally important statutory rights of the juvenile" and therefore required a statement of

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rehabilitative court system for juveniles. 387 U.S. 1, 27 (1967). *But see* Feld, *supra* note 80, at 62. Feld points out that despite the intervention of the U.S. Supreme Court, legislative and judicial reforms have largely left juveniles with little of the protections the social reformers had in mind. *See id.*

[85] *See, e.g.*, Kent v. United States, 383 U.S. 541, 553-54 (1966) (holding that transfer proceedings must comport with basic standards of due process and fair treatment, while acknowledging the therapeutic nature of the juvenile court). *But see* SCHWARTZ, *supra* note 69, at 159 ("The informality and confidentiality of juvenile court proceedings and the broad discretion given to judges and other professionals working in the court contributed to widespread abuses . . . . The situation is tantamount to sacrificing the civil liberties of children in exchange for 'good intentions.'").

[86] McKeiver v. Pennsylvania, 403 U.S. 528, 543-44 (1971) ("[T]he fond and idealistic hopes of the juvenile court proponents and early reformers of three generations ago have not been realized.").

[87] *See Kent*, 383 U.S. at 541.

[88] The four landmark cases are *McKeiver*, 403 U.S. 528, *In re Winship*, 397 U.S. 358 (1970), *In re Gault*, 387 U.S. 1, and *Kent*, 383 U.S. 541.

[89] Waiver of jurisdiction refers to the process by which a juvenile court may decline to maintain jurisdiction of a juvenile court case and then transfer the case to adult court. *See* Campaign for Youth Justice, Fact Sheet: Trying Youth as Adults, at 2, http://www.campaignforyouthjustice.org/fact_sheets.html (last visited Apr. 10, 2008). States' waiver policies and proceedings vary. *Id.* at 2-3.

[90] *Kent* involved the prosecution of a 16 year old for housebreaking, robbery and rape. *Kent*, 383 U.S. at 543-44. The U.S. District Court for the District of Columbia convicted Kent of housebreaking and robbery. *Id.* at 550. Kent appealed, and the judgment was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit. *See Kent v. United States*, 343 F.2d 247, 261 (1964), *rev'd*, 383 U.S. 541 (1966). At trial, Kent's attorney filed a motion for a hearing on the issue of waiver of Juvenile Court jurisdiction along with an affidavit from a psychiatrist that recommended Kent receive psychiatric treatment due to "severe psychopathology." *Kent*, 383 U.S. at 545. Kent's attorney also filed a motion with the Juvenile Court to gain access to his client's social service filed arguing that access to the file was "essential to his providing petitioner with effective assistance of counsel." *Id.* at 546. The Juvenile Court judge did not rule on the motions and declined to hold a hearing on waiver. *Id.* Instead he ordered Kent to be tried in adult court stating that "after 'full investigation, I do hereby waive' jurisdiction of petitioner . . . ." *Id.*

reasons or considerations before a judge's waiver of juvenile jurisdiction.[91] Additionally, the Court held that a juvenile is entitled to counsel during the waiver proceeding and that counsel must have a meaningful opportunity to participate in the proceedings.[92] While the Court's holding in *Kent* emphasized the need for procedural safeguards in waiver proceedings, the Court continued to acknowledge the therapeutic nature of juvenile court. As the Court explained:

> The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens patriae* rather than prosecuting attorney and judge. But the admonition to function in a "parental" relationship is not an invitation to procedural arbitrariness.[93]

Thus, the Court expressed concern that juvenile proceedings, while purporting to care for and attend to children's needs, actually do more harm than good. Justice Fortas ominously predicted, "there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[94]

The holding in *Kent* paved the way for the 1967 decision *In re Gault*, the seminal case in juvenile jurisprudence, which held that due process protections must be extended to juvenile

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[91] *Kent*, 383 U.S. at 556. The Court noted that while the statement need not be "formal" or include "conventional findings of fact," it must show that the statutory requirement of a "full investigation" was met and "must set forth the basis for the order with sufficient specificity to permit meaningful review." *Id.* at 561.

[92] *Id.* at 561. A meaningful opportunity to participate in the proceeding requires, for example, that counsel has access to the child's social records. *Id.*

[93] *Id.* at 554-55. But, in the opinion, Justice Fortas also insisted that the holding did not require that the "hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing." *Id.* at 562.

[94] *Id.* at 556. *See generally* Joel F. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7 (1965) (critiquing the goals of both the original reformers, who sought to eliminate the adversary system, and the current reformers, who argue for more procedural protections and propose a system that introduces procedures at the administrative level with the opportunity for judicial oversight); David R. Barrett, William J. T. Brown, & John M. Cramer, Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966) (noting the criticism of the juvenile courts and the concern that children may be "relinquish[ing] too many . . . rights in exchange for an unfulfilled promise of treatment rather than punishment").

delinquency proceedings.[95] These protections included the rights to formal notice, appointed counsel, confrontation, and cross-examination as well as the privilege against self-incrimination.[96] In *Gault*, the Court drew a sharp distinction between providing children with "careful, compassionate, and individualized treatment," and relaxed procedures that deprive juveniles of key fundamental rights.[97] Indeed the Court declared, "[U]nbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[98]

Although *Gault* signified a shift in the approach of the juvenile court system by providing youth with key procedural safeguards, *Gault* did not, nevertheless, reject the rehabilitative model that provided the legal underpinnings of the juvenile court.[99] *Gault* did not suggest that the rehabilitative model was inappropriate; rather, it contended that the system had gone awry.[100] The oft-cited quote from Justice Fortas emphasizes this point. He famously remarked, "[T]he condition of being a boy does not justify a kangaroo court."[101] Indeed, the *Gault* Court insisted, "the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits for the juvenile process."[102]

Three years later, the Court held that every element of a juvenile delinquency case must be proven beyond a reasonable doubt in *In re Winship*.[103] However, a year later the Court stopped short of guaranteeing juveniles the full protections

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[95] *In re* Gault, 387 U.S. 1, 1 (1967). *Gault* involved a fifteen-year-old boy accused of making a lewd phone call to his neighbor. *Id.* at 4.

[96] *Id.* at 33-34, 41, 55-57.

[97] *Id.* at 18-19.

[98] *Id.* at 18.

[99] *Id.* at 21-22. *But see* ZIMRING, *supra* note 82, at 40-41 (offering an opposing view that *Gault* and *Winship* reflect a departure from traditional juvenile court jurisprudence). Zimring argues that if the purpose of the juvenile court is to intervene for the child's best interests, then the procedural safeguards introduced in *Gault* and *Winship* pose a barrier to such aggressive intervention. *Id.* Furthermore, he argues that providing procedural safeguards reflects a "diversionary justification" of the court, in which the primary goal is diverting juveniles from the harsh results of the adult criminal system. *Id.* at 35.

[100] *See In re Gault*, 387 U.S. at 21-22.

[101] *Id.* at 28.

[102] *Id.* at 21.

[103] 397 U.S. 358, 367 (1970) (emphasizing again that "the observance of the standard of proof beyond a reasonable doubt 'will not compel the States to abandon or displace any of the substantive benefits of the juvenile process'" (citing *In re Gault*, 387 U.S. at 21)).

afforded adults when it held in *McKeiver v. Pennsylvania* that there is no constitutional right to a jury in juvenile court proceedings.[104] Returning to the rehabilitative and therapeutic underpinnings of the juvenile court system, the Court concluded that a jury trial, "if required as a matter of constitutional precept, will remake the juvenile proceedings into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding."[105]

By the early 1970s, the Court made a subtle return to the original basis of the juvenile court system: to support, protect, and foster rehabilitation in youth charged with violating the law.[106] The Court acknowledged the importance of striking a "judicious balance" between providing procedural safeguards in the juvenile court system and ensuring that the system remains informal and focuses on rehabilitation rather than punishment.[107] In sum, the Court attempted to make a bargain with children: courts would forego a fully adversarial system complete with the full panoply of due process rights afforded to defendants in the adult system, while in exchange children would experience a court system that focused on their unique backgrounds and needs. Moreover, the system would continue to reject punishment in exchange for rehabilitative services that assisted juveniles in restoring their lives.[108]

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[104] McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

[105] *Id.* The Court emphasized that the "fond and idealistic hopes of the juvenile court proponents and early reformers . . . have not been realized." *Id.* at 543-44. However, the Court blamed the failures of the system on "[t]he community's unwillingness to provide people and facilities and to be concerned, the insufficiency of time devoted, the scarcity of professional help, the inadequacy of dispositional alternatives, and our general lack of knowledge . . . ." *Id.* at 544.

[106] Many critics of *McKeiver* argue that although the court stated that denying juveniles the constitutional right to a jury trial was because the system should be informal since the purpose was to "help" children, in reality the system was already turning punitive and denying juveniles the right to a jury trial only served to penalize them. *See* Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver: *Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1144-45, 1154 (2003). Furthermore, much of the criticism of *McKeiver* hinges on the fact that juveniles do not have a right to a jury trial, but through state and federal law, their juvenile adjudications may be used against them for the purposes of a sentencing enhancement in adult criminal court. *See, e.g.*, *id.* at 1155 n.144 (citing numerous articles that are critical of *McKeiver*).

[107] *McKeiver*, 403 U.S. at 545 (citing Commonwealth v. Johnson, 234 A.2d 9, 15 (Pa. Super. Ct. 1967)).

[108] One author has used the analogy that a "deal" was struck between juvenile defendants and the State to provide juveniles with rehabilitation in exchange for sacrificing certain due process rights. Douglas M. Schneider, *But I was Just a Kid!:*

IV. SHACKLING AND THE REPUDIATION OF A BARGAIN

The routine and indiscriminate use of shackles on juveniles violates the bargain courts struck with children in the juvenile justice system—that in exchange for fewer procedural protections, juveniles would be offered treatment and rehabilitative services.[109] Therefore, the primary objective of the juvenile justice system is to rehabilitate youth. However, shackles run directly contrary to this goal. Shackles affect a juvenile's sense of right and wrong; cause physical and psychological harm, stigma, and embarrassment; foster a sense of distrust for the justice system; and teach children that

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Does Using Juvenile Adjudications to Enhance Adult Sentences Run Afoul of Apprendi v. New Jersey*?*, 26 CARDOZO L. REV. 837, 840 (2005); *see also* Commonwealth v. Fisher, 62 A. 198, 200 (Pa. 1905) (holding that in order to "save a child from becoming a criminal" the Legislature may bring the child to court "without any process at all, for the purpose of subjecting it to the state's guardianship and protection"). One of the hallmarks of the juvenile court system is the flexible array of services available to family court judges when adjudicating delinquent juveniles. Instead of only probation or incarceration, which are so often the only choices in adult court, juvenile court judges may choose from a variety of community based and alternative to incarceration programs, along with residential treatment programs and secure detention facilities. *See* MICHAEL A. CORRIERO, JUDGING CHILDREN AS CHILDREN: A PROPOSAL FOR A JUVENILE JUSTICE SYSTEM 132-35 (2006). Unfortunately, many scholars conclude that despite intervention from the U.S. Supreme Court, the modern juvenile justice system was and continues to be a failure. *See, e.g.*, Feld, *supra* note 80, at 75-76 (discussing the deplorable conditions of juvenile confinement historically and today as an example of the juvenile court's illusory commitment to rehabilitation).

[109] Shackling is not the only practice that reflects a repudiation of the bargain with juveniles to provide a less punitive system in exchange for depriving them of the full panoply of due process rights. Indeed, beginning in the 1990s, there was a major shift in the juvenile justice system toward a more punitive system. Referring to the "criminalizing of the juvenile court," Barry Feld argues that four key developments led to a tightening of the juvenile justice system and an emphasis on punishment and just deserts. Feld, *supra* note 80, at 62. Those developments were the "removal of status offenders [from juvenile jurisdiction], waiver of serious offenders to the adult system, increased punitiveness, and procedural formality." *Id.* Other indications that the juvenile justice system became more punitive are legislative initiatives in the 1990s implemented to criminalize youth and their offenses, the increase in juvenile placement to residential facilities, and the increase in the number of delinquency cases that were transferred to criminal courts. David R. Katner, *The Mental Health Paradigm and the MacArthur Study: Emerging Issues Challenging the Competence of Juveniles in Delinquency Systems*, 32 AM. J.L. & MED. 503, 504 (2006); *see also* ZIMRING, *supra* note 82, at 44-47; Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 415-18 (2003); Randall T. Salekin et al., *Juvenile Transfer to Adult Courts: A Look at the Prototypes for Dangerousness, Sophistication-Maturity, and Amenability to Treatment Through a Legal Lens*, 8 PSYCHOL. PUB. POL'Y & L. 373, 373-74 (2002); Schneider, *supra* note 108, at 840 (arguing that the use of a juvenile adjudication as a prior offense for purposes of a sentencing enhancement under the Armed Career Criminal Act violates the "deal" that was struck between juveniles and the State to provide juveniles with rehabilitation in exchange for certain procedural rights).

they will be treated like criminals.[110] In this section, I begin with a discussion of the extent to which courts require children to appear in shackles. Next, I will address the justifications offered for shackling and explain why these justifications neither represent essential interests significant enough to merit shackling juveniles nor outweigh the detrimental effects shackling has on juveniles. Then, I will examine the physical and psychological harms shackles cause to children. Finally, I will briefly examine the right to treatment afforded to children in rehabilitative facilities, why this right should apply with equal force when children are going through juvenile court proceedings, and how shackling children violates this right to treatment.

A. Shackling: Extent of the Practice

While litigation on shackling is sparse, reports from local courtrooms around the country indicate that shackling is a pervasive practice in juvenile court proceedings.[111] In twenty eight states, some juvenile courts routinely require juveniles to remain in shackles throughout their court proceedings.[112] Anecdotal evidence from juvenile defenders around the country provides examples of the routine use of shackles on juveniles. A survey of defender offices in Florida revealed that in some counties, the practice of requiring children to wear shackles during juvenile court proceedings has persisted for over twenty years. While in other counties the practice is relatively new, and courts have implemented the system of shackling children over the past five years.[113] Additionally, the Director of Juvenile

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[110] *See infra* Part IV.C.

[111] Through the assistance of Bob Boruchowitz, Visiting Clinical Professor of Law at Seattle University Law School, I submitted a brief survey with seven questions on shackling practices to the American Council of Chief Defenders ListServe. The seven questions asked were (1) Does the courtroom where you practice shackle juveniles? (2) What, if any, criteria are used to determine whether a juvenile should be shackled? (3) Does your courtroom use "restraint boxes" or "restraint belts" on juveniles? (4) Do any of the state run programs (detention/treatment) require juveniles remain in shackles while they are waiting for their court appearances? (5) If yes, are the shackles removed once the juvenile is in front of the judge? (6) What, if any, types of arguments have you made in opposition to the use of shackles on juveniles you represented in court? (7) What has the court ruled? Finally, we also asked respondents to share any copies of pleadings and of the court's rulings. The survey produced a small number of responses, not sufficient to draw systemic conclusions, but consistent with observations reflected in news articles and cases discussed in this Note.

[112] Moore, *supra* note 15, at 1A.

[113] Carlos Martinez, *Why Are Children in Florida Treated as Enemy Combatants*? CORNERSTONE, May-Aug. 2007, at 10-11, *available at* http://www.pdmiami.com/

Delinquency Defense in Hartford, Connecticut reported that all children in juvenile court proceedings are shackled and there is no individualized determination of danger or risk of flight.[114] Instead, the Connecticut courts allowed the judicial marshals, who provide courtroom security, to make determinations about safety risk and whether shackles were necessary.[115] Furthermore, all juveniles coming from outside programs run by the Connecticut Department of Children and Families ("DCF") are required to wear restraint belts, even those who are in secure holding rooms.[116]

The policy reported in Louisville, Kentucky juvenile courts is similar to Hartford's.[117] The Chief Public Defender for Louisville-Jefferson County noted that all juvenile court defendants are required to be in handcuffs at all times while in the courtroom.[118] There is no individualized determination of danger or risk of flight.[119] Furthermore, defenders' motions to oppose shackling are frequently denied on the grounds that the sheriff's department is in charge of courtroom security, and the department sets the policy about shackling or otherwise restraining juvenile defendants.[120]

In other state counties, it is common practice to shackle all juveniles who are "in custody," which includes children detained in a local facility and children in the custody of the state juvenile prison.[121] In these counties, the shackles are not

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NLADACornerstoneMartinezArticleMay-Aug2007.pdf) (citing Miami-Dade County Public Defenders Office survey of public defender offices throughout Florida).

[114] E-mail from Christine Rapillo, Director of Juvenile Delinquency Defense at the Office of the Chief Public Defender in Hartford, Connecticut, to Bob Boruchowitz, Visiting Clinical Professor of Law at Seattle University Law School (Oct. 29, 2007, 7:46 a.m.) (on file with author).

[115] *Id.* Rapillo noted that last year a policy was issued requiring an individualized determination of danger by a judge before a child could be shackled in court. *Id.* However, she reported that this practice has stopped in favor of leaving the decision up to the Judicial Marshalls. *Id.*

[116] *Id.* A restraint belt is made out of leather and has metal rings at the front. The strap goes around a child's waist and the rings are connected to the handcuffs by a chain, thus having the effect of limiting a child's range of movement. Complaint, *Jenny P.*, *supra* note 1, ¶ 20.

[117] E-mail from Daniel T. Goyette, Louisville Metro Public Defender to Bob Boruchowitz, Visiting Clinical Professor of Law at Seattle University Law School (Oct. 29, 2007, 7:47 a.m.) (on file with author).

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] E-mail from Christina Phillis, Juvenile Division Manager of the Maricopa County Defenders Office to James Haas, Maricopa County Public Defender (Oct. 28, 2007, 5:49 a.m.) (on file with author) [hereinafter Phillis e-mail]; e-mail from Kay Locke, Managing Attorney of the Juvenile Division of the Montgomery County Ohio

removed when the children are in the courtroom and before the judge.[122] Again, public defenders note that the decision to leave the shackles on during court proceedings is largely based on recommendations from law enforcement, as opposed to individualized determinations by the judge.[123] Moreover, when attorneys oppose the use of shackles, the courts rarely grant the motions on the grounds that there is no issue of prejudicing the trier of fact since there are no jury trials in these proceedings.[124]

In contrast, some localities have been successful in arguing against the routine and indiscriminate use of shackles on juveniles. For example, in Cumberland County, Pennsylvania, juveniles are not shackled unless they are "deemed to be a serious threat to the public."[125] If they are deemed to be a serious threat, the Probation Officer must seek the judge's approval to shackle the juvenile.[126] Juvenile defender Ron Turo explained "Since he instituted this policy approximately two years ago, we [the county] have only two to three shacklings out of hundreds of detained children."[127]

Florida has conducted the most recent public campaign against shackling juveniles.[128] Over the past year, public

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Public Defender's Office, to Bob Boruchowitz, Visiting Clinical Professor of Law at Seattle University Law School (Oct. 29, 2007, 11:14 a.m.) (on file with author) [hereinafter Locke e-mail]. Phillis and Locke both reported this practice in their juvenile courts. Phillis noted that juveniles in residential treatment, as opposed to detention or jail, are not required to wear shackles when they appear in court. Phillis e-mail, *supra*.

[122] Kay Locke of Montgomery County, Ohio indicated that shackles remain on during hearings unless the judge, in his discretion, agrees to remove them. Locke e-mail, *supra* note 121. However, it is unpredictable whether or not judges will agree to have shackles removed and the decision to remove shackles is not based on any particular criteria. *Id.*

[123] *Id.* (indicating that judges have stated that the practice of routine shackling "originates from the Sheriff's Department"). Locke further notes a pendulum swing effect where judges may order shackles removed once children are in the courtroom, but once there is an incident of running or violence by a child, every child is shackled for the next few months. *Id.* Then shackles may be removed until the next "incident." *Id.*

[124] Phillis e-mail, *supra* note 121. Phillis noted that "[o]n rare occasion[s] a judge may grant an oral motion to remove the shackles and handcuffs of the very young." *Id.*

[125] E-mail from Ron Turo, Juvenile Defender in Cumberland County Pennsylvania to Bob Boruchowitz, Visiting Clinical Professor of Law at Seattle University Law School (Oct. 29, 2007, 9:44 a.m.) (on file with author).

[126] *Id.*

[127] *Id.*

[128] The Public Defender's Office in the Eleventh Judicial Circuit of Florida has explicitly argued that the indiscriminate use of shackles is "inconsistent with the rehabilitative purpose of the juvenile justice system." Memorandum from Marie

defenders in Miami have been fighting the blanket policy of shackling all juveniles throughout their entire court proceedings.[129] The attorneys initially attempted to work with court administrators to end the practice.[130] However, once the talks proved unsuccessful, they filed over one hundred motions in the Miami juvenile courts requesting that their clients be allowed to appear in court without shackles.[131] Ultimately, the judges began hearing and granting the individual motions.[132]

Additionally, in New York, the Legal Aid Society brought a lawsuit against the Office of Children and Family Services ("OCFS") to challenge its policy of shackling all juveniles in its custody and requiring them to remain in shackles while they await their court appearance and when in front of the judge.[133] This challenge was successful in that the New York Supreme Court granted a temporary restraining order requiring that John F. appear in court without shackles on December 13, 2007 or any other date on which he was to appear in court, unless there was an individualized assessment demonstrating that he posed a "serious evident danger to himself and others."[134] In addition, the court signed a stipulation and order between the Legal Aid Society and OCFS

Osborne, Chief, Juvenile Div., Pub. Defender's Office, Eleventh Judicial Circuit of Florida, Memorandum to Honorable Lester Langer (May 17, 2006), *available at* http://www.pdmiami.com/unchainthechildren/Appendix_B_Memo_to_Hon_Judge_Langer_re_Shackling.pdf.

[129] Martinez, *supra* note 113, at 10; *see also* Bennett H. Brummer et al., Public Defender's Office, Sample Motion for Child to Appear Free from Degrading and Unlawful Restraints, 10-16, 2006, *available at* http://www.pdmiami.com/unchainthechildren/Motion_for_Child_to_Appear_Free_from_Degrading_and_Unlawful_Restraints.pdf (arguing that shackling is harmful to children and is contrary to the principles of Florida's juvenile justice system).

[130] *Id.*

[131] *Id.*

[132] *See* Jon Burstein, *Detained Children Will Not Be Shackled in Courtrooms, Judges Rule*, S. FLA. SUN-SENTINEL, Sept. 26, 2006, *available at* http://www.pdmiami.com/Detained_juveniles_will_not_be_shackled.htm. Courts in Broward County also ordered judges to discontinue blanket shackling policies. Nikki Waller, *Shackling of Kids Curtailed in Broward Courtrooms*, MIAMI HERALD, Sept. 25, 2006, *available at* http://www.pdmiami.com/Herald-Shackling_of_kids_curtailed_in_Broward.htm. *But see* Kathleen Chapman, *Judges Refuse to Unshackle Juveniles*, PALM BEACH POST, Feb. 2, 2007, *available at* http://www.pdmiami.com/Palm_Beach_Post-Judges_refuse_to_unshackle_juveniles.pdf (reporting on Palm Beach County juvenile judges' refusal to remove shackles from juveniles in their courtrooms).

[133] John F. v. Carrion, No. 07/407117 (N.Y. Sup. Ct. Dec. 12, 2007). The Legal Aid Society is currently "engaged in expedited settlement talks" with OCFS. Telephone interview with Nancy Rosenbloom, Director of Special Litigation and Law Reform Unit, Legal Aid Society, New York City (Apr. 28, 2007).

[134] Order to Show Cause for Preliminary Injunction and Temporary Restraining Order at 2, *John F.*, No. 07/407117.

whereby OCFS agreed to apply any final judgment on this matter to all similarly situated defendants.[135]

Thus, while there have been successful challenges to the practice of routinely shackling juveniles in court, many jurisdictions continue to apply blanket policies without any showing of need. This system is in direct conflict with the constitutional rule established in *Deck v. Missouri*[136] and is also undermined by the existing case law on shackling children in juvenile court.[137] The blanket policies are further discredited by the fact that the justifications offered for shackling juveniles do not rise to the level of an essential state interest and ignore the policy and purpose behind the juvenile justice system.

B. Justifications Offered for Shackling Juveniles

There are three main justifications that are routinely offered for the indiscriminate use of shackles on juveniles: (1) the need for courtroom security and the dearth of court resources to maintain security; (2) the lack of concern for prejudice because of the absence of jury trials; and (3) the potential for shackling to serve as a deterrent to future criminal conduct by detained youth.[138] These justifications fail to demonstrate the "essential state interest" requirement established in *Holbrook v. Flynn* and reiterated in *Deck*.[139] Further, none of these stated justifications outweighs the detrimental physical and psychological harm shackling causes to juveniles.

Some courts have suggested that security in the courtroom and courthouse should be considered when determining whether shackles are appropriate.[140] One court gave deference

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[135] Stipulation and Order at 2, *John F.*, No. 07/407117.

[136] *See supra* Part II.C.

[137] *See infra* Part V.

[138] *See In re* Staley, 352 N.E.2d. 3, 6 (Ill. App. Ct. 1976) (discussing jury prejudice), *aff'd* 364 N.E.2d 72 (1977); State v. Merrell, 12 P.3d 556, 559-60 (Or. Ct. App. 2000) (discussing lack of court resources); State *ex rel.* Juvenile Dep't of Multnomah County v. Millican, 906 P.2d 857, 860-61 (Or. Ct. App. 1995) (discussing jury prejudice); State v. E.J.Y., 55 P.3d 673, 679 (Wash. Ct. App. 2002) (discussing jury prejudice); Martinez, *supra* note 113, at 11 (discussing courtroom security).

[139] *See supra* Part II.B-C.

[140] Martinez, *supra* note 113, at 11-12; *see also* Deck v. Missouri, 544 U.S. 622, 624 (2005) (recognizing that the need to maintain order and security may suffice as an "essential state interest" to justify the use of visible shackles). However, in *Deck*, the Court was talking about maintaining courtroom security "specific to the defendant on trial" as opposed to a general desire to maintain security. *Id.*; *see In re R.W.S.* 728 N.W.2d 326, 331 (N.D. 2007) (holding that the trial judge failed to properly exercise his

to the bailiff's position regarding the positive impact shackling had on courtroom security and decorum, instead of making an individualized determination for the child.[141] Other arguments focused on the notion that children are impulsive and difficult to control, and therefore shackling is necessary to minimize fights and maintain security.[142]

In contrast, in *Tiffany A. v. Superior Court of Los Angeles County*,[143] the California Courts of Appeal expressly stated that the "source of the 'need,'" to justify the use of shackles must come from a record of violence or threat of violence *by the accused*.[144] There, the prosecution and the sheriff's department's main reasons for asserting that every juvenile needed to be shackled were the absence of sufficient security personnel and the design of the Lancaster courthouse.[145] However, the California Courts of Appeal concluded that a lack of courtroom personnel is not a sufficient justification for requiring a juvenile to appear in shackles during his or her proceedings.[146] This justification for courtroom security fails to acknowledge less restrictive means other than shackling that could achieve the same goal of security.

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discretion when a juvenile requested that his shackles be removed during an adjudicatory hearing). In *In re R.W.S.*, the North Dakota Supreme Court found that a trial judge may not rely on conclusory statements made by law enforcement regarding a serious risk of dangerous behavior as a substitute for an individual analysis. *Id.* However, the court also explained that the security situation at the courtroom and courthouse is just one of the factors that a juvenile court should consider when determining whether or not to require the juvenile to appear in shackles. *Id.* Similarly, in *In re Staley*, the Illinois Court of Appeals also indicated that courtroom security could be one factor justifying the use of shackles. 352 N.E.2d. at 6. In this case, fifteen-year-old Staley was alleged to have committed aggravated battery for his involvement in a fight that occurred between another youth and staff members at a detention home. *Id.* at 5. Staley challenged his delinquency adjudication on the grounds that he was denied a fair hearing because he had been required to appear in handcuffs throughout his hearing. *Id.*

[141] S.Y. v. McMillan, 563 So. 2d 807, 808-09 (Fl. Dist. Ct. App. 1990).

[142] Martinez, *supra* note 113, at 11. The Florida attorneys successfully litigated the issue, and currently over 95% of the juveniles represented in Miami appear without shackles in front of all four juvenile court judges. *Id.* at 10. Since the first motion filed over 3000 children have appeared in court and there have been no incidents of violence or escape attempts. *Id.*

[143] 59 Cal. Rptr. 3d 363 (Cal. Ct. App. 2007). Here, Tiffany A. got involved in the California Juvenile Court system for allegedly unlawfully taking a vehicle that did not belong to her. Throughout the course of the case, Tiffany A. objected to the requirement that she appear in court in shackles. *Id.* at 366.

[144] *Id.* at 372 (emphasis in original) (citing People v. Cox, 809 P.2d 351 (Cal. 1991) (reaffirming People v. Duran, 545 P.2d 1322 (Cal. 1976)).

[145] *Id.* at 374.

[146] *Id.* at 372 ("We note that no California State court case has enforced the use of physical restraints based solely on the defendants' status in custody, the lack of courtroom security personnel or the inadequacy of the court facilities.").

Specifically, in *Holbrook v. Flynn*, the Supreme Court put forward the option of additional armed security guards as a less prejudicial alternative to shackling a defendant in order to ensure security.[147] Moreover, the absence of sufficient resources to address the courtroom security concerns is not an appropriate reason to require all children to appear shackled in court and does not satisfy the "essential state interest" requirement established in *Holbrook* and reiterated in *Deck*.[148]

Another justification for blanket shackling policies is that juvenile proceedings do not involve a jury, so there is no concern that shackles will create prejudice in the fact-finder. The theory espoused by courts, prosecutors, and courtroom personnel is that because juveniles do not have the right to a jury trial, there is a diminished concern that shackles will serve to prejudice the fact-finder.[149] However, since judges in juvenile court proceedings serve as the triers of fact, they will, arguably, be susceptible to prejudice, as are juries. Accordingly, in *Tiffany A.* the California Courts of Appeal held that the concern of prejudice is applicable even where there is no jury presence.[150] The court distinguished on numerous grounds *United States v. Howard*,[151] a Ninth Circuit decision upholding a district court policy to shackle all in-custody defendants

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[147] *See supra* Part II.B.

[148] *See supra* Part II.C.

[149] *See, e.g.*, *In re* Staley, 352 N.E.2d 3, 7-8 (Ill. App. Ct. 1976) (Stengel, J., dissenting); State *ex rel.* Juvenile Dep't of Multnomah County v. Millican, 906 P.2d 857, 860-61 (Or. Ct. App. 1995) (finding that the shackling of the defendant was harmless error as there was no indication "that trial court's credibility determinations were impermissibly skewed" by the presence of shackles); State v. E.J.Y., 55 P.3d 673, 679 (Wash. Ct. App. 2002) (finding that the shackling of the defendant was harmless error in a bench trial in part because there was no risk of prejudice from viewing restraints by a jury).

[150] *Tiffany A.*, 59 Cal. Rptr. 3d at 370-72. The court relied on both *People v. Fierro*, 821 P.2d 1302 (Cal. 1991), and *Solomon v. Superior Court*, 177 Cal. Rptr. 1 (Cal. Ct. App. 1981), in holding that shackling is prejudicial even during a proceeding without a jury. *Id.* at 371. In both *Fierro* and *Solomon*, the courts considered the use of physical restraints on adult defendants during preliminary hearings where no jury was present. *Fierro*, 821 P.2d at 1321; *Solomon*, 177 Cal. Rptr. At 1-2. In both cases the courts held that the principles from *People v. Duran*, 545 P.2d 1322, 1327 (Cal. 1976), holding that shackling a criminal defendant prejudicially affects the defendant's constitutional right to be presumed innocent, applied to proceedings without a jury. *Fierro*, 821 P.2d at 1322; *Solomon*, 177 Cal. Rptr. at 3. *But see* United States v. Howard, 480 F.3d 1005, 1013-14 (9th Cir. 2007) (holding that use of shackles on criminal defendants during pretrial hearings where no jury is present is permissible because there is no concern of prejudice when the defendant only appears in front of a judge); United States v. Zuber, 118 F.3d 101, 104 (2d Cir. 1997) (same).

[151] 480 F.3d 1005 (9th Cir. 2007).

during their first appearances in front of a federal magistrate.[152] Most relevant to the jury prejudice issue, the court in *Tiffany A.* noted that *Howard* considered only individuals shackled for their first appearances.

In contrast, *Tiffany A.* considered the use of shackles on juveniles at every appearance in the Lancaster juvenile delinquency court.[153] Juvenile judges sit as triers of fact, making crucial determinations regarding a juvenile's future. Among other consequences, juveniles can spend multiple years in detention facilities as the result of a juvenile adjudication. The nature of this proceeding is clearly distinguishable from a first appearance or arraignment in front of a magistrate judge, and therefore concerns about prejudice are certainly applicable, thus affecting the policy on shackling children in juvenile court.

A final justification for routine shackling of juveniles is that shackling may serve as a deterrent for detained children. The theory is that upon viewing each other in shackles and handcuffs, children will no longer want to commit crimes so they can avoid being treated like they were in court.[154] This argument strongly suggests that shackling is a deterrent because of its shame, humiliation, and punitive effects.[155] Juvenile defenders and scholars note that there is no evidence to suggest that shackling juveniles is an effective deterrent to juvenile crime.[156] Moreover, such motives for shackling are in stark opposition to the goals of the juvenile justice system.[157] To require shackling as a form of punishment in the hopes of deterring children from violating the law is unconscionable in light of the historical mission of the juvenile court system to provide treatment for juvenile offenders.

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[152] *Id.* at 1013-14.

[153] *Tiffany A.*, 59 Cal. Rptr. 3d at 375; *see also Millican*, 906 P.2d at 861 (DeMuniz, J., dissenting) ("[U]nnecessarily shackling children in a delinquency hearing is presumptively prejudicial . . . .").

[154] Martinez, *supra* note 113, at 11.

[155] Indeed, punishment has no place in the adult criminal system prior to the determination of guilt. The American judicial system is predicated on a presumption of innocence. In *Deck v. Missouri*, the Supreme Court noted that the use of visible shackles undermines this central tenet of our justice system. 544 U.S. 622, 631 (2005).

[156] *See, e.g.*, Martinez, *supra* note 113, at 11.

[157] *See supra* Part III (discussing the purpose of the juvenile justice system to treat and rehabilitate juveniles). Furthermore, the Supreme Court has recognized that deterrence may not have the same effect on juveniles as it has on adults. *See* Roper v. Simmons, 543 U.S. 551, 571 (2005) ("[T]he absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.").

Routine shackling goes against the Supreme Court's holding in *Deck* that such blanket policies deny individual defendants of a fair trial.[158] Further, the justifications offered in support of routinely shackling children in court fall short of meeting an "essential state interest."[159] Despite the absence of a jury, the judge may still be susceptible to prejudice from stigma-laden shackles. Further, in *McKeiver*, juveniles were denied the right to a jury trial under the premise that the juvenile court system would be rehabilitative and less formal and adversarial.[160] To now justify a punitive measure such as shackling because there is no concern for jury prejudice belies the reasoning behind *McKeiver* and unfairly uses this procedural denial against children.

C. How Shackling Harms Children

It seems axiomatic that the use of shackles does not serve a treatment or rehabilitative purpose.[161] In fact, it is generally accepted that shackling children causes both physical and psychological harm.[162] However, there is a general silence about the practice of routinely shackling children throughout their juvenile court appearances in both case law and scholarly work.[163] Therefore the research discussed in this section about the negative effects of shackling children comes from professionals who study the use of restraints on children in juvenile justice facilities and psychiatric treatment centers.

While the Supreme Court in *Deck* acknowledged that the issue of physical harm with shackles may no longer be a relevant concern for adults,[164] the potential for physical harm is still a pressing concern with respect to children. Shackling can cause physical harm: children who have been required to wear shackles complain of bruising, cuts, and pain around their

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158 *Deck*, 544 U.S. at 624.

159 *Id.* at 628-29.

160 McKeiver v. Pennsylvania, 403 U.S. 528, 545-46 (1971).

161 *See supra* Part IV.B (discussing the justifications for shackling juveniles).

162 *See infra* Part IV.C.

163 *See infra* Part V.A (discussing case law acknowledging the negative effects of shackling on juveniles); John William Tobin, *Time to Remove the Shackles: The Legality of Restraints on Children Deprived of Their Liberty Under International Law*, 9 INT'L J. OF CHILD. RTS. 213, 213, 221 (2001) (arguing that the use of shackles on children is "barbaric" and deprives them of due process rights, and specifically that children should only appear in court in restraints in "exceptional circumstances").

164 *See supra* Part II.C.

wrists and ankles.[165] Moreover, because young people are going through a critical time in their physical development, experts caution that personnel must take caution to avoid damaging children's growth plates.[166] But, even if a gentler type of shackle could be developed that could lessen the pain and the potential for physical damage, there are other compelling reasons to severely limit the use of shackles on children, namely, the traumatic and psychological impact it has on young people.

Indeed, it is generally accepted by medical and mental health professionals that shackling and physical restraints should only be used on juveniles as a last resort.[167] The American Psychiatric Association advises that even when restraints are needed to protect a child, staff should continue to work with the young person to assess the underlying issues resulting in the poor behavior.[168] Further, children in the juvenile justice system have a high prevalence of psychiatric disorders.[169] In particular, girls have extraordinarily high incidents of having experienced physical and sexual abuse.[170] Accordingly, experts suggest that the use of restraints may be "retraumatizing" for young people who have experienced violence or trauma in their lives or are going through stressful experiences.[171] Moreover, the National Center for Mental

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[165] *See* Complaint, *Jenny P.*, *supra* note 1, at 15, 20.

[166] NATIONAL ASSOCIATION OF STATE MENTAL HEALTH PROGRAM DIRECTORS MEDICAL DIRECTORS COUNCIL, REDUCING THE USE OF SECLUSION AND RESTRAINT PART II 8 (2001), *available at* http://www.nasmhpd.org/general_files/publications/med_directors_pubs/Seclusion_Restraint_2.pdf; *see also* Brummer et al., *supra* note 129, app. F ¶ 12 (Aug. 28, 2006) (affidavit describing physical harm that shackling causes children), *available at* http://www.pdmiami.com/unchainthechildren/AppendixFDrGwen%20Wurm.pdf.

[167] *See, e.g.*, *id.*; AMERICAN PSYCHIATRIC ASSOCIATION, THE USE OF RESTRAINT AND SECLUSION IN CORRECTIONAL MENTAL HEALTH CARE 4 (2006), *available at* http://archive.psych.org/edu/other_res/lib_archives/archives/200605.pdf.; Howard Bath, *The Physical Restraint of Children: Is It Therapeutic?*, 64 AM. J. ORTHOPSYCHIATRY 40, 41, 48 (1994); *see also* HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, CUSTODY AND CONTROL: CONDITIONS OF CONFINEMENT IN NEW YORK'S JUVENILE PRISONS FOR GIRLS 45-46 (2006) [hereinafter CUSTODY AND CONTROL], *available at* http://hrw.org/reports/2006/us0906/.

[168] AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 167, at 4 ("[R]estraint for protective reasons . . . does not take the place of efforts to understand and address the causes of the aberrant behavior. In most uses of . . . restraint, the staff should have considered or tried less restrictive means of control . . . .").

[169] LINDA A. TEPLIN ET AL., UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, PSYCHIATRIC DISORDERS OF YOUTH IN DETENTION 2 (2006), http://www.ncjrs.gov/pdffiles1/ojjdp/210331.pdf.

[170] CUSTODY AND CONTROL, *supra* note 167, at 4-5.

[171] Julian D. Ford et al., *Trauma and Youth in the Juvenile Justice System: Critical Issues and New Directions*, NATIONAL CENTER FOR MENTAL HEALTH AND JUVENILE JUSTICE RESEARCH AND PROGRAM BRIEF, June 2007, at 1, 3; *see also*

Health and Juvenile Justice ("NCMHJJ") cautions that "traumatic stress symptoms may worsen as a result of juvenile justice system involvement."[172] The NCMHJJ further notes that "[c]ourt hearings, detention, and incarceration are inherently stressful, and stressful experiences that are not traumatic *per se* can exacerbate trauma symptoms."[173] Thus, children in the juvenile justice system are particularly vulnerable. The imposition of shackles on a young person may exacerbate feelings of isolation and hopelessness, thereby frustrating the purpose of the juvenile justice system.

Given the awareness about the negative impacts of shackling, the Council of Juvenile Correctional Administrators ("CJCA") adheres to specific guidelines for determining when the use of physical restraints on juvenile offenders is appropriate.[174] These guidelines emphasize the limited situations when physical restraints might be appropriate, the types of personnel who should apply restraints on children, the duration for which restraints should be used, and appropriate follow-up care.[175] Further, these statements suggest that the

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Brummer et al., *supra* note 129, app. D ¶ 18 (Aug. 23, 2006) (affidavit discussing traumatic impact of shackling on children who have been abused), *available at* http://www.pdmiami.com/unchainthechildren/AppendixDBeyer.pdf.

[172] *Id.* at 3.

[173] *Id.*

[174] The CJCA is a national not-for-profit organization whose mission, in part, is to "improve local juvenile correctional services, programs, and practices." http://cjca.net/AboutUs.aspx?~SUQ9ZjRhMjhmMDUtNTM2OS00OGMzLTlhNDAtZTEzOTNkYjQ1MzVk. *See* Council of Juvenile Correctional Administrators, Position Paper on Physical and Mechanical Interventions with Juvenile Offenders (2003), *available at* http://cjca.net/photos/content/documents/Interventions.pdf.

[175] The five CJCA guidelines are:

> 1. Use of physical interventions or restraints is a last resort and should always follow the prudent preventative use of screening, classification and programmatic interventions;
>
> 2. Physical intervention and/or restraints should only be deployed when de-escalation of the crisis has failed and the need to protect staff, other youths or the jurisdiction's property is necessary;
>
> 3. At such time that those preventive measures fail, physical interventions and restraints should only be done by trained individuals and only used defensively and in a manner that provides maximum safety for the staff and youths;
>
> 4. Use of physical or other intrusive intervention methods should only continue as long as the youth presents a danger to self, other or property;
>
> 5. Medical, mental health and /or administrative case reviews of interventions deployed should be apart of the quality assurance process and required.

Id.

use of physical restraints and shackles on children is not to be taken lightly. Restraints are dangerous and may have serious traumatic effects on a child. Therefore, they should not be used routinely and indiscriminately as a stopgap measure to ensure safety in an aging courtroom or to prevent the potential for unruly behavior where no indication of the potential for such behavior is present.

Beyond the physical and psychological trauma caused by shackles, requiring juveniles to appear in court with visible shackles is an affront to their moral identity and sense of self. Children and adolescents are in a particularly fragile state of development.[176] Many young people struggle with their self-image and feelings of insecurity. Exacerbating these feelings of uncertainty, visible shackles cause embarrassment and shame.[177] Moreover, they brand juveniles as violent and dangerous criminals. These negative messages are not only hurtful; they contravene the values the juvenile justice system is supposed to present.

Finally, the American Bar Association ("ABA") publication on juvenile justice standards does not discuss the use of visible shackles on juveniles in court, and instead focuses on how juvenile detention facilities should be designed in order to foster rehabilitation.[178] This logical disconnect between treatment outside of the system and shackling in court is

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[176] *See generally* ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968) (describing the stages of identity development that adolescents experience). Recently, the U.S. Supreme Court ruled that the imposition of capital punishment on individuals under age eighteen was prohibited by the Eighth and Fourteenth Amendments. Roper v. Simmons, 543 U.S. 551, 578 (2005). In so doing, the Court recognized that children are developmentally and emotionally different from adults, less responsible for their actions and more capable of change. *Id.* at 569-70. The Court noted that there are three main differences between juveniles under 18 and adults. *Id.* at 569. First, juveniles are less mature and have an "underdeveloped sense of responsibility," *id.* (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)); second, juveniles are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," *id.* (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)); and, third, the "character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed," *id.* at 570.

[177] *See, e.g.*, Complaint, *Jenny P.*, *supra* note 1, at 10, 18.

[178] *See generally* INSTITUTE OF JUDICIAL ADMINISTRATION & AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS, ANNOTATED: A BALANCED APPROACH (Robert E. Shepherd, Jr., ed., 1996) [hereinafter STANDARDS]. In a section entitled "Corrections," the Standards briefly mention "restraints" when addressing residential programs. *Id.* at 52. Section 7.8 addresses limitations on restraints and weapons. *Id.* "Given the small size of programs, it should not be necessary to use mechanical restraints within the facility. The program director may authorize the use of mechanical restraints during transportation only." Andrew Rutherford & Fred Cohen, *Standards Relating to Corrections Administration*, *in* STANDARDS, *supra*, at 29, 52.

another type of psychological effect of shackling on children. It is confusing and illogical to treat children punitively when they are going through courtroom proceedings and then establish firm guidelines to ensure a therapeutic environment once the youngsters are adjudicated.

The ABA standards spend considerable time detailing the architectural and interior design of juvenile facilities and the types of values the designs should promote.[179] The standards discuss a range of facilities from secure corrections and detention facilities, to group home and residential treatment centers.[180] In general, the Standards guide facilities to promote "normalization."[181] They emphasize that while children are going through the juvenile court system, juvenile facilities do not need to reinforce a notion of criminality. Further, even regarding secure detention facilities, the Standards implore that these facilities should "provide a pleasant environment."[182] Thus, the ABA recommends that the juvenile justice system resemble a treatment setting, as opposed to a prison. The atmosphere should be calming and "normalizing" rather than promote a feeling of deviance or isolation in the children. Requiring children to routinely appear shackled in court makes no sense given these standards.

The general silence on the issue of shackling children in court does not suggest that the practice is inconsequential. Rather, it demonstrates that most professionals are focused on the post-adjudicative or disposition[183] phase of a child's experience in juvenile court. Perhaps the emphasis has been on this phase because judges and scholars are trying to ensure

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[179] *See* Allen M. Greenberger, *Standards Relating to Architecture of Facilities*, *in* STANDARDS, *supra* note 178, at 19, 21.

[180] *Id.* at 20.

[181] *Id.* at 21. "Normalization" is defined as "[e]nabling juveniles within the juvenile justice system to project an image that does not mark them as deviant." *Id.* at 19.

[182] *Id.* at 27. A secure detention facility is designed to house accused juveniles and to prevent them from leaving at will. *Id.* at 25. Each state has different policies on when a child will be required to reside in a secure detention facility. As opposed to secure detention, many juveniles remain in the community in their homes and are expected to report to court with a parent or guardian for each appearance. Those juveniles who are dangerous, do not comply with court orders, or are at risk of flight, may be required by the judge to stay in a detention facility during the adjudication process.

[183] In juvenile court the terms "adjudication" and "disposition" are substituted for "conviction" and "sentence." This shift in language underscores the intended differences between juvenile court and the adult system. Children in the juvenile court system are not actually being convicted of a crime or sentenced to punishment.

that the time children spend in treatment facilities or detention centers does, in fact, result in treatment and, moreover, does not actually cause harm.[184] However, it is fundamentally inconsistent to treat children punitively when they are going through the adjudication process and then provide treatment and rehabilitation once they leave the courtroom. It makes little sense to leave children physically and psychologically bruised during their courtroom appearances and then deliver them to an array of social services design to "rehabilitate" them. If the juvenile justice system is premised on providing treatment services for children, that treatment must begin when children enter the courthouse.[185] The justifications of courtroom security and lack of prejudicial effect pale in comparison to the compelling research regarding the deleterious effects of shackling on children. Moreover, the ABA Standards, which provide that juvenile justice facilities should further a sense of normalization as opposed to deviance, further bolster the argument that shackling children in court contravenes the goals of the juvenile justice system.

D. Children and the Right to Treatment

Courts have recognized that once adjudicated as delinquent, juveniles have a constitutional "right to treatment," which includes the right to freedom from unreasonable bodily restraint.[186] However, the routine and indiscriminate use of

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[184] A thorough examination of conditions of confinement in youth facilities is beyond the scope of this Note. *See generally* CUSTODY AND CONTROL, *supra* note 167 (discussing the conditions in two New York State institutions where female juvenile delinquents are confined).

[185] On the other hand, it can also be argued that indiscriminate shackling violates a juvenile's due process rights. Although the juvenile justice system is supposed to be therapeutic, the Supreme Court provided juveniles with certain due process rights to ensure that they were not taken advantage of by the system and still had the opportunity for a fair trial. *See supra* Part III.B. The Supreme Court has established that indiscriminate use of visible shackles violates a defendant's right to a fair trial and numerous juvenile courts have followed suit, applying the standard to the juvenile court system. *See supra* Part II and *infra* Part V.

[186] *See* Alexander S. v. Boyd, 876 F. Supp. 773, 797-98 (D.S.C. 1995) (citing Youngberg v. Romeo, 457 U.S. 307 (1982)). The right to treatment developed in the context of individuals who have been involuntarily committed for mental health treatment, but courts apply this right with full force to delinquent juveniles. *See* Santana v. Collazo, 714 F.2d 1172, 1177, 1179 (1st Cir. 1983) (holding that juveniles do not have a constitutional right to "rehabilitative training" but relying on *Youngberg* to find that juveniles do "have a due process interest in freedom from unnecessary bodily restraint which entitles them to closer scrutiny of their conditions of confinement than that accorded convicted criminals"); *see also* Jackson v. Johnson, 118 F. Supp 2d 278,

shackles on children demonstrates that young people do not enjoy a right to treatment during their court proceedings. The legal right to treatment serves as another reason why the practice of shackling children in court is fundamentally inconsistent with the goals of the juvenile justice system.

Since juveniles, even when adjudicated as delinquents, are not really convicted of crimes, once a young person is adjudicated delinquent and sent to a facility, "restrictions on [a juvenile's] liberty . . . must be reasonably related to some legitimate government objective—of rehabilitation, safety or internal order and security."[187] This means that a juvenile may not be placed in confinement or subjected to mechanical restraints of any form without a determination that these restrictions serve the rehabilitative needs of the child. Moreover, even when a restriction of liberty is based on "safety or internal order and security," it cannot be an arbitrary or indiscriminate practice.[188] Rather, facility officials must demonstrate that they have tried less restrictive means, and have no alternative but to employ restraints.[189]

For example, *Pena v. New York State Division for Youth*, the first New York case to address the issue of shackling juveniles in treatment facilities, established the standard in New York that unless absolutely necessary, shackling is antithetical to the goals and objectives of the juvenile justice system.[190] In that case, the Southern District of New York explicitly stated that the physical restraints were "highly anti-therapeutic."[191] Moreover, the court recalled that when the

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289 (N.D.N.Y. 2000), *aff'd in part*, 13 Fed. Appx. 51 (2d Cir. 2001); B.H. v. Johnson, 715 F. Supp. 1387, 1394 (N.D. Ill. 1989).

[187] *Collazo*, 714 F.2d at 1180.

[188] *Id.*

[189] *See id.* at 1181.

[190] Pena v. N.Y. State Division for Youth, 419 F. Supp. 203, 211 (S.D.N.Y. 1976). This case involved the use of shackles on children placed at Goshen, a residential facility for boys adjudicated as delinquents. *See id.* at 204. The court held that the New York State Division for Youth may not use shackles or restraints without an individualized determination of danger. *Id.* at 211. This rule is codified in the new York Code, which states "Physical restraints . . . shall be used only in cases where a child is uncontrollable and constitutes a serious and evident danger to himself or others." 9 N.Y.C.R.R. § 168.3(a).

[191] *Pena*, 419 F. Supp. at 211. The court did not fully prohibit the use of shackles, but made clear that shackles should only be used when necessary and that there must always be an individualized determination of need. The court was specifically referring to the facility practice of binding boys' hands and feet with handcuffs and plastic straps and then leaving them on the floor for hours at a time. Moreover boys were also bound to furniture. While the use of restraints and shackles in

United States Supreme Court decided to deprive juveniles of the full panoply of procedural rights, they "made it clear that the constitutional justification for this procedural deprivation is the *parens patriae* underpinning of the juvenile justice system and its absolute proscription against punishment and retribution as permissible objectives."[192] Accordingly, juveniles have a right to rehabilitative treatment that is violated when the juvenile justice system employs methods that are anti-therapeutic and punitive.[193]

Unfortunately, the legal analysis underpinning a child's right to treatment once she has been adjudicated delinquent has not translated into a similar right during courtroom proceedings. Clearly, the indiscriminate use of shackles on children while they appear in court is anti-therapeutic. The right to treatment should be enjoyed when children enter the court system, and the same standard that prohibits arbitrary use of restraints on children in treatment settings should govern the use of shackles in court. Beyond this basic inconsistency, when juveniles wait for hours in shackles for their court appearances with no determination having been made that the child is violent or dangerous, they may become confused. Children may understand that their out-of-control behavior in a facility has a consequence and may result in the use of restraints. However, in court, if without acting inappropriately they are still restrained, children will not understand why they are being punished.

Thus, some courts have established that the use of shackling violates the goals of the juvenile justice system, or at the very least is intrusive of juveniles' liberty, and should

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confinement is beyond the scope of this Note, Pena is still illustrative of an early court acknowledging that use of shackles can be "anti-therapeutic" and punitive. *Id.*

[192] *Pena*, 419 F. Supp. at 206.

[193] *Id.* (citing numerous cases for the proposition that juveniles have right to rehabilitative treatment). *See, e.g.*, Morales v. Turman, 364 F. Supp. 166, 175 (E.D. Tex. 1973); Martarella v. Kelley, 349 F. Supp. 575, 600 (S.D.N.Y. 1972); Inmates of Boys Training School v. Affleck, 346 F. Supp. 1354, 1364-65 (D.R.I. 1972); Nelson v. Heyne, 355 F. Supp. 451, 459 (N.D. Ind. 1972). The court reasoned that that the right to treatment proscribes any detention of youth in a juvenile justice system that does not provide for rehabilitative treatment. In concluding that the use of shackles and restraints in the manner prescribed in this case was anti-therapeutic and punitive, the court held that the practice violated the youths' due process rights under the Fourteenth Amendment. *Pena*, 419 F. Supp. at 207. This Note argues that similar to detention, the repeated use of shackling juveniles during court proceedings is also anti-therapeutic and violates children's rights to rehabilitation and treatment- the primary objective of the juvenile justice system.

therefore not be imposed arbitrarily.[194] Given this acknowledgment, combined with research demonstrating the harmful effects of shackling on juveniles and the lack of sufficient justifications to outweigh these harmful effects, the current widespread practice of shackling children in court makes a mockery of the goals of the juvenile justice system.

V. TOWARD A LEGAL ANALYSIS OF SHACKLING JUVENILES THAT REFLECTS THE PURPOSE OF THE JUVENILE COURT SYSTEM

Shackling is a harmful practice that undermines the goals of the juvenile justice system and causes serious harm to children. This premise is not controversial among juvenile justice scholars and practitioners, yet the practice persists.[195] Evidence demonstrates that shackling juveniles causes both physical and psychological damage and that children in the juvenile justice system are particularly vulnerable.[196] It is axiomatic that children are developmentally different from adults. Yet, juvenile courts often limit their analysis of shackling to the framework used in non-juvenile proceedings. That is, shackles are prejudicial when they are visible to juries, and since there are no juries in juvenile court, there is no prejudicial effect.[197] However, courts should focus on the unique impact shackling has on children and how it controverts the purposes of the juvenile justice system.

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[194] Tiffany A. v. Superior Court, 59 Cal. Rptr. 3d 363, 375 (Cal. App. 2007) (holding that shackling without an individualized determination of need conflicts with the rehabilitative goals of the juvenile court system); State v. Merrell, 12 P.3d 556, 558 (Or. Ct. App. 2000) (holding that the use of shackles must be justified by a determination that the defendant poses an immediate risk of danger or potential for escape); *In re* Staley, 352 N.E.2d 3, 6 (Ill. App. Ct. 1976) (requiring the state to show a "good reason" in order to justify use of shackles), *aff'd*, 364 N.E.2d 72.

[195] *See supra* Part IV.A.

[196] *See supra* Part IV.C.

[197] *See* Deck v. Missouri, 544 U.S. 622, 626, 632 (2005) (holding visible shackles are prejudicial to criminal defendants and thus are prohibited during the capital sentencing phase as well as the guilt phase absent an essential state purpose). As discussed in Part II, *supra*, the U.S. Supreme Court has cited two other primary concerns regarding visible shackles: impairing communication between the defendant and his attorney, and degrading the dignity and decorum of the courtroom. While the few juvenile courts that have addressed the issue of visible shackles have acknowledged these other two arguments, the absence of jury prejudice has led some judges to conclude that any error was harmless. *See, e.g.*, State *ex rel.* Juvenile Dep't of Multonomah County v. Millican, 906 P.2d 857, 860-61 (Or. App. 1995); State v. E.J.Y., 55 P.3d 673, 679 (Wash. App. 2002).

A. The Legal Standard for Juveniles

Most of the case law on the use of shackles in courts involves the adult criminal justice system as opposed to the juvenile court system.[198] Some states, however, have addressed the routine use of shackles on youth in juvenile court proceedings.[199] The states that have addressed the issue of shackles in juvenile court proceedings primarily echo the general principle that has been applied in the adult court system: shackles should not be required unless there is an individualized determination of need.[200] The opinions indicate that while juvenile court proceedings may not have the same concern regarding the prejudicial effect of shackles in front of a jury, other concerns emphasized in *Deck* are still relevant.[201] These courts relied on the same reasoning as the United States Supreme Court in *Deck*—that shackles affect the ability to be present and participate in one's defense, are an affront to human dignity and to the dignity of the courtroom, and impair one's ability to communicate with counsel.[202] However, in

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[198] *See*, *e.g.*, Shapiro, *supra* note 32, at 17 (discussing several state cases recognizing as a general rule an accused's right to appear at trial free of shackles).

[199] California, Oregon, Illinois, Washing, North Dakota, and Florida have case law on the issue of shackling juveniles during juvenile court proceedings. *See, e.g.*, Tiffany A. v. Superior Court of L.A. County, 59 Cal. Rptr. 3d 363 (Ct. App. 2007); S.Y. v. McMillan, 563 So. 2d 807 (Fla. Dist. Ct. App. 1990); *In re* Staley, 352 N.E.2d 3 (Ill. App. Ct. 1976), *aff'd*, 364 N.E.2d 72 (1977); *In re* R.W.S., 728 N.W.2d 326 (N.D. 2007); State *ex rel.* Juvenile Dep't of Multnomah County v. Millican, 906 P.2d 857 (Or. Ct. App. 1995); State v. E.J.Y., 55 P.3d 673 (Wash. Ct. App. 2002). There is more case law on the use of physical restraints during confinement either in a juvenile detention facility or residential treatment center. *See, e.g.*, *Pena*, 419 F. Supp. at 207; *Martarella*, 349 F. Supp. at 583.

[200] Courts vary on what factors should be considered for determining need. *See* Tiffany A. v. Superior Court of L.A., 59 Cal. Rptr. 3d 363, 373 (Cal. Ct. App. 2007); *In re* Deshaun M., 56 Cal. Rptr. 3d 627, 630 (Cal. Ct. App. 2007) (finding that a lesser showing of need is required for shackling a juvenile during a jurisdictional hearing in a juvenile delinquency proceeding compared to a jury trial). In *Tiffany A.*, the court found that two main principles from *Deshaun M.* should be considered when determining if shackling juveniles is necessary: (1) the type of proceeding determines the showing required to justify shackling (e.g., a jury trial requires a greater showing than a bench trial) and (2) the reason for the need of shackling must be a record of violence or a threat of violence by the accused. *Tiffany A.*, 59 Cal. Rptr. 3d at 372. The court expressly stated that lack of courtroom personnel is not a sufficient reason for a showing of need. *Id.* at 373. *But see In re* R.W.S., 728 N.W.2d 326, 331 (N.D. 2007) (finding that the security situation of the courtroom and courthouse is one of the factors to consider).

[201] *See, e.g.*, *Tiffany A.*, 59 Cal. Rptr. 3d at 366; *Staley*, 352 N.E.2d. at 5; *Millican*, 906 P.2d at 860.

[202] Deck v. Missouri, 544 U.S. 622, 624 (2005)*; Tiffany A.*, 59 Cal. Rptr.3d at 366; *Deshaun M.*, 56 Cal. Rptr. 3d at 629-30; *Staley*, 352 N.E.2d at 5-6; *R.W.S.*, 728 N.W.2d at 330; *Millican*, 906 P.2d at 860.

addition, many courts then assert that since juveniles do not have a right to a jury trial, there is no possibility for jury prejudice. Thus, the analysis results in the conclusion that that failure to make an individualized determination of need is harmless error.[203]

Although there may be a diminished concern for prejudice in juvenile court, there are other concerns, primarily the conflict with the goals of the juvenile justice system. The absence of a strong concern for jury prejudice should not leave the door open for courts to justify shackling children when it is well-documented that the practice is physically and psychologically damaging to children.

The opinion in *Tiffany A. v. Superior Court of Los Angeles County* is a model for a legal analysis of shackling juveniles that reflects both the distinct needs of children and the objectives of the juvenile justice system.[204] In that case, the California Superior Court held that shackling without an individualized determination of need was unlawful not only because it violated the principles from *Deck*, but also because the use of shackles was contrary to the principles of the juvenile justice system.[205] The court noted that "[t]he objectives of the juvenile justice system differ from those of the adult . . . system, and thus justify a less punitive approach to those who stand accused . . . before the court."[206] Therefore, while some courts have concluded that adult defendants do not have the right to appear unshackled when there is no jury present, *Tiffany A.* stands for the proposition that there are other considerations besides the prejudicial effect of shackles that demand restricting its use.[207] Indeed the court emphatically stated:

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[203] *See supra* note 149 and accompanying text.

[204] *See* Tiffany A. v. Superior Court of L.A. County, 59 Cal. Rptr. 3d 363 (Ct. App. 2007).

[205] *Id.* at 374-75.

[206] *Id.* The court distinguished *Howard* on a number of different grounds. First they noted that an individualized security assessment may not have been possible for each defendant prior to his or her initial appearance, second *Howard* only concerns first appearances where as the instant case concerned the use of shackles at each appearance, and third *Howard* involved proceedings with multiple defendants. *Id.* at 374.

[207] The Second and Ninth Circuit Courts of Appeals have both held that visible shackles worn in front of a magistrate judge, who will not make the ultimate determination of the defendant's guilt, do not offend the principles from *Deck*. *See* United States v. Howard, 480 F.3d 1005, 1013-14 (9th Cir. 2007); United States v. Zuber, 118 F.3d 101, 104 (2d Cir. 1997). The court in *Tiffany A.* distinguished *Howard*, in which the Ninth Circuit held that a district-wide policy to shackle all adult in-

> [T]he rationale of the California cases—that the Constitution does not require juveniles to have the full complement of rights afforded adult defendants because to do so would introduce a tone of criminality into juvenile proceedings—would not be served by requiring all juveniles, irrespective of the charges against them, or their conduct in custody, to wear shackles during all court proceedings.[208]

Similarly, in *Juvenile Department of Multnomah County v. Millican*, the Oregon Supreme Court concluded that the adult standards for shackling must apply to juveniles.[209] However, they held that the error in this case was harmless because there was no evidence of prejudice or indication that the shackles "adversely affected the child's decision to testify," noting that he did so "without any suggestion of discomfort or reluctance."[210] In dissent, Judge De Muniz argued that the error was not harmless. He focused his argument on the distinct characteristics of juveniles. In addition to the factors from *State v. Kessler*,[211] the prevailing case in Oregon on standards for applying shackles on adult criminal defendants, he suggested the court should consider the "potentially prejudicial effect on a child's *ability* to testify, because shackling is likely to be more psychologically jarring for children than adults."[212]

Dissenting Judge De Muniz properly noted that shackles may "undermine a child's confidence in telling his side of the story, which would adversely affect the credibility determination of even the most experienced juvenile judge."[213] Moreover, he asserted that shackling children without a record of individualized need "not only violates the protections afforded adults, it also thwarts the historical purpose of Oregon's juvenile justice system."[214] This type of analysis recasts the issue into one about the distinct nature of juveniles and recalls the premise of the juvenile justice system. In order for the insidious practice of shackling juveniles to end, courts must see beyond the rule set forth in *Deck* and challenge the

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custody defendants for their first appearances before the federal magistrate did not violate constitutional rights. *Tiffany A.*, 59 Cal. Rptr. 3d at 374-75.

[208] *Tiffany A.*, 59 Cal. Rptr.3d at 375.

[209] State *ex rel.* Juvenile Dept. of Multnomah County v. Millican, 906 P.2d 857, 860 (Or. Ct. App. 1995).

[210] *Id.* at 861.

[211] 645 P.2d 1070 (Or. Ct. App. 1982).

[212] *Millican*, 906 P.2d at 861.

[213] *Id.* at 861.

[214] *Id.* at 862.

practice on the grounds that it violates the principles of the juvenile justice system.

B. The Court as a "Locus for Education"

If the obvious harms that result from shackling children are not enough, there is another reason to end this insidious practice. Time spent within the juvenile court system should be an opportunity for children to learn powerful lessons about fairness, equality, and justice—three pillars of our democracy. Historically, the court was seen as a place for ongoing education of the child.[215] As one scholar remarked, the juvenile court was "a locus for education and an instrument of social instruction in the path to citizenship . . . . The school and court are bound in an intricate public mission: to teach, to care for, to sanction the young."[216] Children are in an ongoing process of learning, and much of what they learn is by example.[217] Furthermore, research suggests that when children believe a law is legitimate they are more likely to comply with it.[218] Courtroom policies that require the routine use of shackles on juveniles are arbitrary and reinforce in children the notion that our justice system is unfair and inequitable.

Shackles are a mark of guilt and are utterly dehumanizing. Indeed, shackles conjure the image of a caged animal. If we want to teach children and youth to respect people, to make

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[215] Bernardine Dohrn, *The School, the Child, and the Court*, *in* A CENTURY OF JUVENILE JUSTICE 267, 267-69 (Margaret K. Rosenheim et al. eds., 2002). Dohrn notes that the school and the court were historically intertwined. *Id.* at 267. The first juvenile court coincided with social movements around public education for children. *Id.* Although not directly relevant to the arguments in this Note, the U.S. Supreme Court's analysis of children's free speech rights in school in the landmark case *Tinker v. Des Moines School District* serves as an analogy for understanding the argument against blanket shackling policies. In *Tinker*, the Court held that children had free-speech rights in school that were not necessarily subsidiary to the authority of school officials. 393, U.S. 503, 508 (1968). The Court emphatically stated that the mere "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* Similarly, "mere undifferentiated fear" should not be sufficient to justify the wholesale shackling of children in the juvenile court system.

[216] *Id.* at 268-69. A detailed discussion of the interplay between the school and the court is beyond the scope of this Note. However, the author points out that the pedagogical stance of the early juvenile court often preached racial superiority and a rigid formulation of appropriate behavior and cultural norms. *Id.* at 304. This Note draws on the analogy between schools and courts only to argue that courts can be seen as an outlet for teaching democratic ideals. And, to the extent that the court may serve this purpose, shackling stands in contrast to such values.

[217] *See* ZIMRING, *supra* note 82, at 17.

[218] Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, SOCIAL JUSTICE RESEARCH, Sept. 2005, at 217, 236.

independent choices instead of succumbing to peer-pressure, and to think cautiously and astutely before they act, then the court system should serve as a model for such values.[219] Instead, by routinely shackling young people, without exercising any individual judgment, the court sends a contradictory message to children and youth—one that suggests that independent judgment is not in fact valued. Further, shackling is a violent practice and gives the message that the court will treat suspected violence with violence. This eye-for-an-eye type of message does little to educate young people about respect and trust. Moreover, it certainly does not leave children with any reason to have faith in the system that is judging them. Just as children's rights do not stop at the school house door, rights for young people do not stop at the courtroom door.[220]

Ending the practice of shackling does not have to result in sacrificing important values, such as promoting safe courts and communities, and ensuring young people are made aware of the consequences of their actions. As former New York Supreme Court Judge Michael Corriero[221] has noted, "Focusing on the best interests of the child . . . does not mean circumventing the best interests of society. The two interests are, for the most part, coextensive. What's good for the child in a democratic society is good for society as a whole."[222] Society benefits when we treat children fairly by limiting the use of dehumanizing shackles to only those individuals that otherwise absolutely cannot be controlled. All of the children who enter the juvenile justice system will eventually return to society. Society will benefit from children who come back to their communities without the scars of shackling. The imprint left on the mind when a young person who is required to appear in court in shackles, in front of family and community members, may leave us with a child who is forever scarred. It is time to remove the chains and return to the rehabilitative goals of the

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[219] *See* ZIMRING, *supra* note 82, at 17-22 (arguing that modern adolescence is akin to a "learner's permit" whereby children are constantly learning behaviors and much of what they learn is from following examples).

[220] *See* Tinker v. Des Moines Sch. Dist., 393 U.S. 503-05 (1969). Rights for juveniles do not stop at the courthouse door, except for those rights that are inconsistent with the status of being a juvenile. *See supra* Part III.B.

[221] Judge Corriero was the presiding judge of the Manhattan Criminal Court Youth Part from 1992 to 2006. CORRIERO, *supra* note 108, at vii. He heard cases involving 13, 14 and 15 year olds who were being tried as adults pursuant to New York's Juvenile Offender Law. *Id.* at 7.

[222] *Id.* at 6.

juvenile justice system. Then, perhaps, the courtroom may return as a "locus for education."[223]

CONCLUSION

Shackling is a physically and psychologically damaging practice that contravenes the ultimate goal of the juvenile justice system: to rehabilitate children. Criminal defendants in the adult system enjoy the right to appear in court free from visible shackles.[224] Many juveniles, however, still suffer under blanket policies requiring the routine use of shackles without an individualized determination of need.[225] When juvenile courts require children to appear in court shackled, the message young people learn is that they are violent, dangerous criminals. This practice is inconsistent with juveniles' right to treatment and has the effect of actually harming children. Jenny P. and the thousands of other children who go through the juvenile justice system in America are in that system because our society believes they should be given an opportunity to learn from their mistakes, change their behaviors, and receive services to assist them in realizing their full potential. Juvenile courts should end the routine practice of shackling so they may pursue the goal of rehabilitating children.

Anita Nabha[†]

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[223] *See supra* Part V.B.

[224] *See supra* Part II.

[225] *See supra* Part IV.A.

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